UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS M.,	)	3:20-CV-00868 (KAD)
Plaintiff,	)	
	)	
v.	)	
	)	
KILOLO KIJAKAZI,[1]	)	
Acting Commissioner of Social Security,	)	
Defendant.	)	OCTOBER 15, 2021

MEMORANDUM OF DECISION

Kari A. Dooley, United States District Judge:

The Plaintiff, Thomas M., (the "Plaintiff") brings this administrative appeal pursuant to 42 U.S.C. § 405(g). He appeals the decision of the defendant, the Commissioner of the Social Security Administration, (the "Commissioner"), denying his application for disability insurance pursuant to Title II of the Social Security Act (the "Act"). The Plaintiff moves to reverse the Commissioner's decision because, he argues, the administrative law judge's ("ALJ") decision is unsupported by substantial evidence, the administrative record was not properly developed, and the ALJ erred in finding that Plaintiff could perform a significant number of jobs in the national economy. Conversely, the Commissioner asserts that the ALJ's decision is fully supported by substantial evidence in the record, and he seeks an order affirming the decision of the ALJ. For the reasons set forth below, the Plaintiff's Motion to Reverse, ECF No. 17, is DENIED and the Commissioner's Motion to Affirm, ECF No. 19, is GRANTED.

[1] At the time that Plaintiff commenced this action, Andrew Saul was the Commissioner of Social Security. On July 9, 2021, Kilolo Kijakazi became the Acting Commissioner of Social Security and is replaced as the defendant in this action. *See* Fed. R. Civ. P. 25(d).

Standard of Review

A person is "disabled" under the Act if that person is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 423(d)(1)(a). A physical or mental impairment is one "that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* §§ 423(d)(3). In addition, a claimant must establish that his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." *Id.* §§ 423(d)(2)(A).

Pursuant to regulations promulgated by the Commissioner, a five-step sequential evaluation process is used to determine whether a claimant's condition meets the Act's definition of disability. *See* 20 C.F.R. § 404.1520. In brief, the five steps are as follows: (1) the Commissioner determines whether the claimant is currently engaged in substantial gainful activity; (2) if not, the Commissioner determines whether the claimant has "a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509" or a combination of impairments that is severe and meets the duration requirements; (3) if such a severe impairment is identified, the Commissioner next determines whether the medical evidence establishes that the claimant's impairment "meets or equals" an impairment listed in Appendix 1 of the regulations; (4) if the claimant does not establish the "meets or equals" requirement, the Commissioner must then determine the claimant's residual functional capacity ("RFC") to perform his past relevant work; and (5) if the claimant is unable to perform his past work, the Commissioner must next

determine whether there is other work in the national economy which the claimant can perform in light of his RFC and his education, age, and work experience. *Id.* §§ 404.1520(a)(4)(i)-(v); 404.1509. The claimant bears the burden of proof with respect to Step One through Step Four, while the Commissioner bears the burden of proof as to Step Five. *McIntyre v. Colvin*, 758 F.3d 146, 150 (2d Cir. 2014).

It is well-settled that a district court will reverse the decision of the Commissioner only when it is based upon legal error or when it is not supported by substantial evidence in the record. *See, e.g.*, *Greek v. Colvin*, 802 F.3d 370, 374–75 (2d Cir. 2015) (*per curiam*); *see also* 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive"). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Talavera v. Astrue*, 697 F.3d 145, 151 (2d Cir. 2012) (quotations marks and citation omitted). "In determining whether the agency's findings were supported by substantial evidence, the reviewing court is required to examine the entire record, including contradictory evidence and evidence from which conflicting inferences can be drawn." *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013) (*per curiam*) (quotation marks and citation omitted). "Under this standard of review, absent an error of law, a court must uphold the Commissioner's decision if it is supported by substantial evidence, even if the court might have ruled differently." *Campbell v. Astrue*, 596 F. Supp. 2d 446, 448 (D. Conn. 2009). The court must therefore "defer to the Commissioner's resolution of conflicting evidence," *Cage v. Comm'r of Social Sec.*, 692 F.3d 118, 122 (2d Cir. 2012), and can only reject the Commissioner's findings of fact "if a reasonable factfinder would *have to conclude otherwise*," *Brault v. Social Sec. Admin.*, 683 F.3d 443, 448 (2d Cir. 2012) (*per curiam*) (quotation marks and citation omitted) (emphasis in *Brault*). Stated simply, "[i]f there is

substantial evidence to support the [Commissioner's] determination, it must be upheld." *Selian*, 708 F.3d at 417.

Factual and Procedural History

On September 28, 2015, Plaintiff filed an application for Disability Insurance Benefits under Title II of the Social Security Act, alleging an onset of disability date of December 23, 2014. The claim was denied initially on November 25, 2015 and upon reconsideration on April 1, 2016. Plaintiff requested a hearing before an ALJ and, on October 25, 2017, the ALJ issued an unfavorable decision. Plaintiff pursued an appeal of the initial decision through the Social Security Administration's Appeals Council and as well to the district court. On October 1, 2018, the Honorable Robert M. Spector entered an order granting remand to the Social Security Administration following a consent motion for remand by the Commissioner. Thereafter, the ALJ held a new hearing on January 13, 2020 and rendered a partially favorable decision for Plaintiff on April 27, 2020, which was amended to address formatting and notice issues.

On remand, the ALJ evaluated anew the severity of Plaintiff's condition, received updated evidence in the record, provided additional detail concerning Plaintiff's residual functional capacity during specific time periods, and obtained additional evidence from a vocational expert. The ALJ ultimately concluded that Plaintiff was disabled as of May 8, 2018. At Step One the ALJ found that Plaintiff had engaged in substantial gainful activity from December 2014 to December 2015. At Step Two, the ALJ found that Plaintiff suffered from two severe impairments: behavioral variant frontotemporal dementia and depressive disorder. The ALJ also found, however, that these severe impairments did not meet the requirements of 20 C.F.R. § 404, Subpart P, Appendix 1 at Step Three.

Accordingly, the ALJ proceeded to determine Plaintiff's residual functional capacity, and the ALJ found that, prior to May 8, 2018, Plaintiff had the residual functional capacity to perform a full range of work at all exertional levels, though with non-exertional limitations that included having no public interaction, having only limited interactions with coworkers and supervisors, and performing only simple, routine, and repetitious work that would not require teamwork or working closely with the public. After May 8, 2018, which is the same date on which the ALJ found Plaintiff to be disabled, the ALJ found that Plaintiff had the residual functional capacity to perform work at all exertional levels but that he was also unable to stay on task for more than eighty percent (80%) of the time. Key to this finding was a letter from Dr. Joseph Trettel, a treating neuropsychiatrist, who reviewed a series of tests on that date and recognized "severe declines in multiple cognitive domains."

Following from these findings, the ALJ's analyses in Steps Four and Five are likewise divided into two periods of time. Prior to May 8, 2018, the ALJ found that although Plaintiff could not perform past relevant work at Step Four, Plaintiff could have performed a significant number of jobs in the national economy at Step Five. Specifically, Plaintiff was capable of performing work as a hand packager, with 664,000 jobs in the national economy; a dishwasher, with 506,000 jobs in the national economy; and an industrial cleaner, with 2,166,000 jobs in the national economy. After May 8, 2018, however, the national economy contained no jobs that Plaintiff could have performed given his residual functional capacity. Accordingly, the ALJ found that Plaintiff was disabled from May 8, 2018 to the date of his decision.

Following that decision, Plaintiff timely filed this appeal.

Discussion

Plaintiff advances four arguments. First, Plaintiff argues that the finding that Plaintiff's disability began no earlier than May 8, 2018 is unsupported by substantial evidence because the record makes manifest that the Plaintiff was disabled well before then. Plaintiff's second argument is that the administrative record was inadequately developed because the record did not include the opinions of treating physicians concerning Plaintiff's functioning and ability to work between December 23, 2014 and May 8, 2018. Third, Plaintiff argues that the ALJ erred in his Step Five analysis because the vocational expert's testimony was inadequate to prove the requisite number of available jobs in the national economy and because the ALJ misinterpreted the vocational expert's testimony. Plaintiff's final argument is that the ALJ's Step Three findings, specifically, were unsupported by the record because the ALJ's analysis was untethered from the record.

The Commissioner contests each of these assertions and asserts that the evidence in the record demonstrates that Plaintiff's impairment became worse over time and that a specific medical report supported the ALJ's decision that Plaintiff was disabled as of May 8, 2018. Moreover, the Commissioner asserts that it was Plaintiff's responsibility to properly develop the record, and, in any event, the medical records cited by Plaintiff were not necessary in order for the ALJ to render his decision. As to the ALJ's reliance upon and alleged misinterpretation of the vocational expert's testimony, the Commissioner argues that the testimony was properly supported and relied upon and that Plaintiff misreads the record. Finally, the Commissioner points to specific evidence in the record that support the ALJ's conclusion as to Step Three—the Listings analysis.

Substantial Evidence Supports the Finding that Plaintiff Was Not Disabled Prior to May 8, 2018

Plaintiff claims to have been disabled since December 2014, when a urological issue caused Plaintiff anxiety and thus triggered his mental deterioration. He cites to a record from Dr.

Trettel which indicates that Plaintiff developed anxiety and insomnia as a result of receiving concerning information from his urologist. (Plf.'s Mem. 1, ECF No. 17-2.) Plaintiff maintains that his mental health continued to deteriorate, eventually resulting in a diagnosis of "fulminant apathy syndrome" in July 2016. (*Id.* at 3.) Indeed, Plaintiff asserts that Dr. Trettel's July 2016 diagnosis alone establishes, at the very least, an earlier onset date than that found by the ALJ. Plaintiff also cites to treatment notes from Dr. Philip Barasch from June 18, 2015, as supporting an even earlier onset date for his disability. (*Id.*)

"Generally, the [effective onset date] is the earliest date that the claimant meets both the definition of disability and the non-medical requirements for entitlement to benefits . . . during the period covered by his or her application." Social Security Ruling 18-01P, 2018 WL 4945639, at *2 (Oct. 2, 2018). As discussed above, the term "disability" means an inability to be engaged in substantially gainful activity by any medically determinable physical or mental impairment which can be expected to result in death or to last for a continuous period of twelve months. *See* 42 U.S.C. § 423(d)(1)(A). The Social Security Administration will consider whether the sum of any claimant's impairments prevent the claimant from engaging in substantial gainful activity, but the Administration may not determine the effective onset date to be before the last day that the claimant performed substantial gainful activity. *See* Social Security Ruling 18-01P, 2018 WL 4945639, at *7 (Oct. 2, 2018); *see also Campbell v. Saul*, 805 F. App'x 23, 25 (2d Cir. Mar. 11, 2020) (resolving a factual dispute over whether a claimant had overcome a presumption of substantial gainful activity created by his earnings records) (citing 20 C.F.R.§ 404.1574(a)(1)).

Here, the ALJ found that Plaintiff maintained substantial gainful activity through December 2015. Plaintiff does not challenge this finding on appeal. The Court notes, however, that the ALJ properly relied on earnings reports which indicated that Plaintiff received income in

2015 which exceeded the SGA guidelines for income earned in a year. (R. 720.) And although the record may show that the Plaintiff suffered from a mental impairment prior to January 2016, that evidence would not overcome the ALJ's finding in this regard. *See* 20 C.F.R. § 404.1520(b) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."). Accordingly, the ALJ's conclusion that Plaintiff was not disabled prior to January 2016 is supported by substantial evidence.

The question for this Court, then, is whether there is substantial evidence to support the conclusion that the Plaintiff was not disabled between January 2016 and May 8, 2018. *See Sczepanski v. Saul*, 946 F.3d 152, 157 (2d Cir. 2020) (quoting *Moran v. Astrue*, 569 F.3d 108, 112 (2d Cir. 2009)). The Court answers this question in the affirmative.

A claimant's residual functional capacity is "the most that [a claimant] can still do despite [his or her] limitations" stemming from his or her medical impairments and any related symptoms. *See* 20 C.F.R. § 404.1545(a)(1). As described above, the ALJ found that, prior to May 8, 2018, Plaintiff retained the residual functional capacity to perform a full range of work at all exertion levels but with some non-exertional limitations. (R. 722.) Specifically, Plaintiff was limited to simple, routine, and repetitious work that did not require interacting with coworkers or working closely with the public. (*Id.*) The ALJ acknowledged that during this time Plaintiff experienced issues with motivation, but he also relied on multiple reports that Plaintiff had normal higher cognitive functioning. (R. 724.) For example, the ALJ cites a report from the Center for Comprehensive Care in which the Plaintiff's primary symptoms were "apathy and reduced initiation" but that Plaintiff "performed entirely within normal limits except for some slowness in timed attention tasks and functional memory." (*Id.*) The ALJ also cited Dr. Trettel's July 2016

report—the same report that Plaintiff claims establishes, at the very least, an earlier onset of his disability—as noting that Plaintiff had no cognitive defects. (*Id.*) Through 2017, the ALJ balanced evidence tending to show Plaintiff's increasing apathy with conflicting evidence indicating that Plaintiff retained some residual functional capacity, such as normal brain-imaging scans and opinions that Plaintiff's disagreement with his wife's claims are not consistent with "an apathetic phenotype" but could be consistent with depression. (R. 725 (citing R. 1223, 1228).)

Indeed, while discussing the May 8, 2018 effective onset date that he ultimately selected, the ALJ directly acknowledged that Plaintiff's condition worsened over time. (R. 725–26.) The ALJ's conclusion that May 8, 2018 was the date at which Plaintiff could no longer engage in substantial gainful activity is supported by Dr. Trettel's letter and treatment notes, which "revealed severe declines in multiple cognitive domains compared to neuropsychological testing 2016 [sic] and diagnosed the claimant with [behavioral variant frontotemporal dementia]." (R. 725.) The ALJ also noted that pre-2018 State agency assessments at the initial and reconsideration levels indicated that Plaintiff retained the capacity to perform some work and that these assessments were consistent with Plaintiff's earlier medical record. (R. 726.) Plaintiff has not contested the ALJ's reliance on those earlier assessments.

Moreover, the Court's review of the record reveals that Dr. Trettel's May 8, 2018 letter and treatment notes of the same date stand in stark contrast to the records which pre-date May 8, 2018. In the May 8 notes, Dr. Trettel summarizes the prior two years' course of treatment and the difficulties encountered in arriving at a correct diagnosis. (R. 1265) ("A second opinion by behavioral neurology at Yale opined that this was a FTLD versus severe anxiety/depression. However the patient failed to respond to any aggressive treatment with psychotropics and continued to deny subjective feelings of depression or anxiety.") The May record reveals, in

contrast, that **recently** repeated neuropsychological testing revealed a "rather dramatic decline in multiple cognitive domains." (*Id.*) Dr. Trettel agreed with the resulting diagnosis by Dr. Kevin Young that the Plaintiff had behavioral variant frontotemporal dementia. Dr. Trettel observed that the prior imaging was "soft," but he noted that the earlier imaging was done early on in the disease process so that the absence of earlier "structural changes/atrophy" was not "terribly surprising." (*Id.*) The May record also reveals that the Plaintiff "is not attending to ADLs or IADLs," or activities of daily living and instrumental activities of daily living. (R. 1266.) For the first time, the treatment plan includes a referral to the Center for Healthy Aging for a "transitional nursing assessment for home care needs;" a "safety assessment;" assistance locating "adult day center to increase individuals socialization and activity levels;" and "assistance with helping the wife [to] obtain DPOA and conservatorship." (*Id.*) The treatment notes further reflect, also for the first time, that the Plaintiff "is not able to make medical decisions on his own behalf." (*Id.*) And although not binding on the Commissioner, Dr. Trettel opines that the Plaintiff is "100% disabled from a functional/occupational perspective." (*Id.*)

Given the significant shift in the Plaintiff's presentation in May 2018, and the lack of similar findings which pre-date the May 8, 2018 records and Dr. Trettel's letter of same date, the ALJ's determination that the Plaintiff was disabled as of May 8, 2018, but not before then, is supported by substantial evidence. Simply put, this situation is the not uncommon one wherein the Court has been presented with conflicting evidence, which the ALJ had a duty to resolve, and the Court concludes that the ALJ resolved that conflict in a reasonable fashion. *See Matta v. Astrue*, 508 F. App'x 53, 56 (2d Cir. Jan. 25, 2013) (citing *Richardson v. Perales*, 402 U.S. 389, 399 (1971)).

The Administrative Record Was Properly Developed

Plaintiff acknowledges that the record in this case was "*reasonably* well developed in terms of cotemporaneous chart notes of treating physicians." (Plf.'s Mem. 10 (emphasis in the original).) Nonetheless, Plaintiff challenges the record for its lack of medical source statements and opinions. (*Id.*) The Commissioner responds that the ALJ has no obligation to seek such opinions pursuant to 20 C.F.R. § 404.1512. (Comm'r's Mem. 9, ECF No. 19-1.) Notably, the Commissioner asserts that the current version of this regulation, which became effective on March 27, 2017 and changed the allocation of responsibility for obtaining certain evidence, applies to *decisions* made after that date. (*Id.* at 9 n.3 (emphasis added).) The Commissioner then argues that even under the prior regulation, the record was sufficiently developed so as to allow the ALJ to make a determination without those opinions.

As a preliminary matter, the Court does not decide whether the current version[2] of 20 C.F.R. § 404.1512 applies to this case because the record before the ALJ was "sufficiently comprehensive to permit an informed finding by the ALJ" without any additional medical source statements. *Martinez*, 2020 WL 6440950, at *7 (quoting *Sanchez v. Colvin*, No. 13-CIV-6303 (PAE), 2015 WL 736102, at *5 (S.D.N.Y. Feb. 20, 2015)). Indeed, an ALJ's failure to obtain opinion evidence from a treating provider does not automatically warrant remand because the medical record can be sufficient to support the ALJ's conclusions. *See Tankisi v. Comm'r of Soc. Sec.*, 521 F. App'x 29, 34 (2d Cir. Apr. 2, 2013). "A medical record that lacks a treating source

[2] The older version of this regulation provided that the ALJ must request a medical source statement containing an opinion of the claimant's residual functional capacity. *See See Martinez v. Saul*, No. 3:19-cv-01017-TOF, 2020 WL 6440950, at *6 (D. Conn. Nov. 3, 2020). The new version contains no such language and puts the burden of proving disability squarely on the claimant. *See* 20 C.F.R. § 404.1512. Some courts have treated the date of filing as dispositive of which set of regulations apply. *See Martinez v. Saul*, 2020 WL 6440950, at *6 (applying the pre-2017 version of 20 C.F.R. § 404.1512 where the claim was filed prior to March 27, 2017); *see also Santos G. v. Comm'r of Soc. Sec.*, No. 1:20-cv-821-DB, 2021 WL 3861424, at * 4 (W.D.N.Y. Aug. 30, 2021) (noting that the Administration "comprehensively" overhauled its regulations, effective March 27, 2017, and that the claim's filing date determines which set of regulations apply). Others have applied the current version of 20 C.F.R. § 404.1512 to claims filed before March 27, 2017. *See Evelyn R. v. Comm'r of Soc. Sec.*, No. 19-cv-01554, 2021 WL 4134722, at *5 (W.D.N.Y. Sept. 10, 2021) (applying the current regulation to a claim filed in 2016 without further comment).

opinion is considered 'sufficient' when its contents are comprehensive enough to facilitate an informed assessment of the claimant's impairments and [residual functional capacity]." *Martinez*, 2020 WL 6440950, at *7. An informed assessment can be derived from something less than a formal opinion from a treating physician, particularly where the record is voluminous. *See Tankisi*, 521 F. App'x at 34. Moreover, the ALJ is entitled to weigh all of the evidence available to him when making a determination about the claimant's limitations and residual functional capacity. *See Matta*, 508 F. App'x at 56. Nevertheless, the evidence upon which the ALJ relies must provide insight into how the claimant's impairments do or do not affect the claimant's ability to work and undertake everyday activities. *Guilen v. Berryhill*, 697 F. App'x 107, 108–09 (2d Cir. Sept. 27, 2017).

The records in this case were sufficient to allow the ALJ to conclude that Plaintiff was not disabled prior to May 8, 2018. For example, in a letter from Dr. Trettel to Dr. Daniel Wollman and dated May 16, 2016, Dr. Trettel provides details about Plaintiff's condition and how it might affect both his ability to work and his everyday life, such as his note that "[Plaintiff's] task setting seems to be intact as once he is told what to do, he can easily commence with the activity and complete it." (R. 641.) Though not a formal medical source statement or opinion, this letter provides "the sorts of nuanced descriptions and assessments that would permit an outside reviewer to thoughtfully consider the extent and nature of [Plaintiff's] impairments and their impact on [his] [residual functional capacity]." *Martinez*, 2020 WL 6440950, at *7 (quotations omitted).

Likewise, progress notes from Dr. Wollman include a "comprehensive neuropsychological examination" of the Plaintiff that had been conducted by J. Dennis Johnson, Ph.D. (R. 1006–1015.) The examination, performed on June 7, 2016, resulted in several recommendations, which included continuing medical care as well as implementing strategies to compensate for mental

impairments. (*Id.*) Such recommended strategies included making lists and following consistent routines. (*Id.*) Further, this report drew a nuanced distinction between the functions affected by Plaintiff's mental disease—functions related to his ability to initiate his own behaviors—and those not affected by Plaintiff's mental disease—higher cognitive functions. (R. 1014.)

And it is significant that the ALJ cited these same reports—and others— when making his determination about Plaintiff's residual functional capacity. (R. 721.) Although these records do not contain formal opinions about the work functions that Plaintiff could perform, they contain the types of nuanced insights that provide an ALJ with the information needed to make a valid determination. *See Tankisi v. Comm'r Soc. of Sec.*, 521 F. App'x at 34 (finding remand inappropriate where a medical record containing no formal opinions nonetheless provided insights into the claimant's limitation); *see also Pellam v. Astrue*, 508 F. App'x 87, 90 n.2 (2d Cir. Jan. 28, 2013) (noting that, for the pre-2017 regulations, the absence of a medical source statement would not necessarily render the record incomplete).

Substantial Evidence Supports the Administrative Law Judge's Findings at Step Five

Plaintiff argues that the vocational expert who testified presented flawed evidence because the Vocational Expert ("VE") did not determine the number of jobs in the national economy with respect to the specific jobs identified as within Plaintiff's capacity to perform. Although the VE identified jobs within the Dictionary of Occupational Titles as within Plaintiff's capacity to perform, she relied upon Bureau of Labor statistics to determine the number of jobs available. This, Plaintiff asserts, is inadequate to meet the Commissioner's burden at Step Five because the Bureau of Labor Statistics tracks the number of jobs available, not on a job-by-job basis, but for entire groups of jobs, of which only one might be identified by the VE as available to the Plaintiff. Plaintiff also asserts that the ALJ misinterpreted the VE's testimony.

"An [ALJ] does not err when he relies on a vocational expert's testimony that is based on personal experience, labor market surveys, and published statistical sources in determining the number of jobs available." *Debiase v. Saul*, No. 3:19 CV 68 (RMS), 2019 WL 5485269, at *11 (D. Conn. Oct. 25, 2019) (quoting *Saad v. Berryhill*, No. 3:17 CV 2000 (KAD), 2019 WL 1429541, at *3 (D. Conn. Mar. 30, 2019) (citing *Jones-Reid v. Astrue*, 934 F. Supp. 2d 381, 407 (D. Conn. 2012), *aff'd*, 515 F. App'x. 32 (2d Cir. Mar. 22, 2013))). *See also Brault v. Social Sec. Admin., Comm'r*, 683 F.3d 443, 449–50 (2d Cir. 2012) (noting that substantial evidence standard applies to vocational expert testimony and that this approach is flexible, allowing a case-by-case inquiry into whether the evidence presented supports the conclusions rendered).

In this case, the vocational expert based her testimony on personal experience, labor market surveys, and published statistical sources when opining about the number of available jobs. (R. 781–82.) Simply put, this foundation is sufficient to render the vocational expert's testimony substantial evidence, and the ALJ did not err when relying on such evidence. And although the numbers corresponding to the available jobs was likely higher than for the individual jobs identified in light of the VE's use of the Bureau of Labor's statistical data, the VE made clear that the numbers she cited were for groups of jobs, not the individual jobs identified. She also testified to the presence of over three million jobs in the national economy. Therefore, even accounting for the fact that these numbers included jobs to which the Plaintiff may not be suited, the testimony provided substantial evidence to support the ALJ's decision at Step Five.

As to the claim that the ALJ misrepresented the VE's testimony, the Court is not persuaded. Although the VE did not use the word "representative" during the hearing, as stated in the ALJ's decision, the VE was asked to provide "examples" of the types of jobs available to an individual with Plaintiff's limitations. The semantic distinction raised by Plaintiff is one, in the Court's view,

without a difference. The Court discerns no functional difference between providing an "example" of such jobs versus identifying a job as "representative" of such jobs. Indeed, one dictionary definition of "example" includes "one (as an item or incident) that is **representative** of all of a group or type." *Merriam-Webster's Collegiate Dictionary* (11th Ed., 2003) (emphasis added.) And "representative" is defined as "serving as a typical or characteristic **example**." *Id.* (emphasis added).

Substantial Evidence Supports the Administrative Law Judge's Step Three Findings

Plaintiff's final argument is a more targeted version of his first—that, with regard to Step Three specifically, the ALJ's findings are not supported by substantial evidence. Plaintiff takes issue with the ALJ's findings that Plaintiff has only moderate limitations in three of the four areas of "Paragraph B" criteria, which is a section of the regulations used to evaluate a claimant's limitations resulting from mental impairments. *See* 20 C.F.R. § 404, subpt. P, app. 1, §§ 12.00E & 12.00F. He asserts, respectfully, that it is "impossible" not to find that Plaintiff's limitations in these three areas are at least marked. Plaintiff also argues that the ALJ's analysis of "Paragraph C" criteria, which is used to evaluate whether a mental impairment is serious and persistent, is not supported by substantial evidence. *See id.* at § 12.00G.

At Step Three, if the claimant's impairment meets or equals one of the diagnostic listings in Appendix 1 of the regulations and meets the duration requirement, then the claimant will be found disabled. *See* 20 C.F.R. § 404.1520(a)(4)(iii). For the mental impairments at issue here—frontotemporal dementia and depressive disorder, which are identified as neurocognitive disorders, 20 C.F.R. § 404, subpt. P, app. 1, § 12.02, and depressive, bipolar, and related disorders, 20 C.F.R. § 404, subpt. P, app. 1, § 12.04—the claimant must meet the Paragraph A criteria and either Paragraph B criteria or Paragraph C criteria. Meeting Paragraph B criteria requires having either

two marked limitations or one extreme limitation in any of the four categories of mental functioning, which include the abilities to understand, remember, or apply information; interact with others; concentrate, persist, or maintain pace; and adapt or manage oneself. *See* 20 C.F.R. § 404, subpt. P, app. 1, § 12.02 & 12.04. Meeting Paragraph C criteria requires showing that the mental disorder is "serious and persistent," *i.e.*, that the disorder has been medically documented for at least two years and there is evidence of both medical treatment, mental health therapy, psychosocial support, or a highly structured environment that diminishes the symptoms of the mental disorder and marginal adjustment or the ability to adapt to changes in the environment. *See id.*

Largely for the reasons discussed above regarding the alleged onset of the Plaintiff's disability, the Court concludes that the ALJ's findings at Step Three are supported by substantial evidence. The ALJ determined that in three of the functional areas—the ability to understand, remember, or apply information; concentrate, persist or maintain pace; and adapt and manage oneself—the Plaintiff had a moderate impairment. (R. 721–22.) For each of these findings, the ALJ noted that earlier testing and treatment notes revealed fewer limitations than appeared in later treatment notes and testing. And, as discussed above, until the May 8, 2018 treatment notes, Plaintiff's record reveals significant issues with respect to apathy and engagement, but little concern for higher cognitive processing and ability. For example, the ALJ cited parts of the record demonstrating that Plaintiff had, at one point, "no significant deficits in attention or memory" and "average rates of attention." *Id.* (citing R. 639, 1500.) He also weighed other evidence in the record, such as later testing showing that Plaintiff demonstrated "poor encoding in memory retrieval and storage" and "significant deficits in attention and processing speed." *Id.* (citing R. 1634.) Upon review of the record as well as the ALJ's decision, it is manifest to the court that the ALJ

considered the relevant criteria at Step Three and was able to support his conclusions by reference to the evidence of record.

In regard to Paragraph C criteria, the ALJ noted that "the record does not show that the claimant has a highly supported environment or that he requires significant assistance to maintain adaptive functioning." (R. 722.) Upon review of the record, the Court agrees with this assessment, even though the ALJ did not cite specifically to any particular portion of the record. "[W]here the evidence of record permits [the court] to glean the rationale of an [ALJ's] decision, [the court] do[es] not require that he have mentioned every item of testimony presented to him or have explained why he considered particular evidence unpersuasive or insufficient to lead him to a conclusion of disability." *Petrie v. Astrue*, 412 F. App'x 401, 407 (2d Cir. Mar. 8, 2011) (quotations and citations omitted). Here, in the preceding paragraph, the ALJ discusses the type of environment in which Plaintiff functioned, and that paragraph indicates that Plaintiff was able to perform basic life activities with some prompting. (R. 722.) The preceding paragraph also notes that Plaintiff had no recent record of in-patient treatment or other hospitalizations. (*Id.*) Therefore, the ALJ's findings as to Paragraph C criteria are sufficiently supported.

Conclusion

For all of the foregoing reasons, the ALJ's determination that the Plaintiff was not disabled prior to May 8, 2018 is supported by substantial evidence and not in error. The Plaintiff's Motion to Reverse, ECF No. 17, is DENIED and the Commissioner's Motion to Affirm, ECF No. 19, is GRANTED. The Clerk of the Court is directed to enter Judgment in favor of the Commissioner and to close the file.

SO ORDERED at Bridgeport, Connecticut, this 15th day of October 2021.

/s/ Kari A. Dooley
KARI A. DOOLEY
UNITED STATES DISTRICT JUDGE